

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF SOUTH DAKOTA

3 SOUTHERN DIVISION

4 * * * * *

Cr. 17-40078

5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 -vs-

8 KEVIN JAY MAST,

9 Defendant.

10 U.S. Federal Courthouse

11 Sioux Falls, SD

12 April 9, 2018

10:00 a.m.

13 * * * * *

14 PUBLIC TRANSCRIPT OF
15 SENTENCING HEARING

16 (PURSUANT TO STANDING ORDER 16-04, PORTIONS OF ALL
17 CHANGE OF PLEA AND SENTENCING TRANSCRIPTS ARE RESTRICTED)

18 * * * * *

19 BEFORE: The Honorable Karen E. Schreier
20 U.S. District Court Judge
21 Sioux Falls, SD

22 APPEARANCES:

23 Mr. Jeffrey C. Clapper
24 Assistant U.S. Attorney
25 PO Box 2638
Sioux Falls, SD 57101-2638
for the Plaintiff

Mr. Gary R. Leistico
Rinke Noonan
Suite 300, US Bank Plaza
1015 West St. Germain Street
St. Cloud, MN 56301

for the Defendant

PRESENT: Defendant Kevin J. Mast

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(Fish and Wildlife Wetland Restoration
Plan, 2-9-2018)

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(Aerial photograph taken 11-19-2017)

* * * * * APRIL 9, 2018 * * * * *

(In open Court, counsel and Defendant present,
at 10:00 a.m.)

THE COURT: This is the time scheduled for a
sentencing in the matter entitled United States of
America vs. Kevin Jay Mast.

Would counsel please note their appearances
for the record.

MR. CLAPPER: Jeff Clapper on behalf of the
United States.

MR. LEISTICO: Good morning, Your Honor.
Gary Leistico on behalf of Mr. Mast.

THE COURT: Mr. Leistico, did you have a
chance to review the Presentence Report with your
client?

MR. LEISTICO: We have, Your Honor.

THE COURT: There were a number of
objections. It looked to me like the report was
amended to address all of them?

MR. LEISTICO: I believe that's correct.

THE COURT: And the Government had no
objections?

MR. CLAPPER: Correct, Your Honor.

THE COURT: There is an instance where
there's not an advisory guideline range.

1 The maximum sentence that could be imposed
2 is up to 180 days in custody. A period of supervised
3 release can be imposed of up to one year. The
4 Defendant could be placed on probation for a period up
5 to five years.

6 The fine range is a maximum of \$10,000.
7 Restitution has been requested in the form of a change
8 to the area to protect the wetlands. The special
9 assessment is \$10.

10 Counsel, do you both agree?

11 MR. CLAPPER: Yes, Your Honor.

12 MR. LEISTICO: Yes, Your Honor.

13 THE COURT: I did review the Defendant's
14 sentencing memorandum and the victim impact statement.

15 Let's take up the wetland restoration plan
16 first with regard to the restitution that's been
17 requested.

18 MR. CLAPPER: Your Honor, with regard to
19 that issue, I would like to offer some testimony from
20 Dave Azure.

21 THE COURT: All right.

22
23 DAVID AZURE,
24 called as a witness, being first duly sworn, testified as
25 follows:

1 DIRECT EXAMINATION

2 BY MR. CLAPPER:

3 Q. Please state your name.

4 A. David Anthony Azure.

5 Q. Who do you work for?

6 A. I work for the United States Fish and Wildlife
7 Service.

8 Q. What's your position there?

9 A. I am currently a wildlife refuge manager at
10 Sand Lake National Wildlife Refuge.

11 Q. You testified at the trial in this case?

12 A. That's correct.

13 Q. Since the verdict was rendered, has the Fish and
14 Wildlife Service drafted a restoration plan in this case?

15 A. Yes, we have.

16 Q. Who did you gather input from in coming up with
17 the restoration plan?18 A. We worked with the staff from the Madison Wetland
19 Management District. I consulted a publication out of
20 Minnesota called the Minnesota Wetland Restoration Guide,
21 produced by the Minnesota Board of Water and Soil
22 Resources, and talked to the engineer that drafted that
23 publication, as well as a gentleman by the name of Ray
24 Finnochiaro.

25 Ray was formerly a wetland ecologist for the

1 United States Geological Survey out of Northern Prairie
2 Wildlife Research Center in North Dakota.

3 Mr. Finnochiaro has done quite a bit of research on drain
4 tile, wetlands obviously, and has worked with us in the
5 past on other wetland easement cases.

6 Q. Based on gathering information from all of those
7 people, the restoration plan submitted to the Court is
8 what your office ultimately concluded on?

9 A. That's correct.

10 MR. CLAPPER: Your Honor, I would offer
11 Government Exhibit 1.

12 THE COURT: Any objection?

13 MR. LEISTICO: If it is the restoration
14 order that is attached to the victim impact report,
15 then I would have no objection, Your Honor.

16 MR. CLAPPER: It is.

17 THE WITNESS: Mr. Clapper, it would be more
18 accurate to say we prepared a draft plan, and then had
19 those two gentlemen look at that plan for their
20 feedback and input on it.

21 THE COURT: It does appear to be the same
22 document that was attached to the victim impact
23 statement. Exhibit 1 is received.

24 BY MR. CLAPPER:

25 Q. Mr. Azure, when you submitted this draft plan to

1 some of the outside consultants, Mr. Finnochiaro, for
2 example, did they have some concerns about the plan as
3 drafted?

4 A. Both gentlemen expressed minor concerns about the
5 plan, both of them from a different perspective.

6 Mr. Finnochiaro, for example, had some concern
7 that the tile that would remain adjacent to or in
8 proximity to Wetland No. 2, I think it's Wetland No. 2 on
9 the very north side of the easement tract, he thought
10 there might be some residual lateral effect of the tile
11 that remained in the ground, thinking it may intercept
12 water that would ultimately end up in the protected
13 wetland if it were not there.

14 Based on my knowledge of the site and based on
15 consultation with the staff at Madison, we didn't think
16 that that was a substantial risk.

17 Q. Of course Mr. Finnochiaro hasn't been to the
18 site. Has he?

19 A. He was at the site years ago when this case first
20 came to light, and we were investigating another
21 restoration technique.

22 Q. Ultimately you decided on the restoration plan
23 that's described in Exhibit 1 and depicted on the last
24 page of Exhibit 1. Is that right?

25 A. That is correct.

1 Q. I'm going to show you on the screen the last
2 page. Can you describe, with making references to this
3 photograph, what the restoration plan entails?

4 A. So this restoration plan entails rendering the
5 tile lines inoperable beginning near the downstream side
6 of each protected wetland area. By rendering inoperable,
7 I mean the removal of approximately 150 feet of the tile
8 and then backfilling with the fill material and
9 compacting that in.

10 Q. Would you also recommend capping off the ends?

11 A. Sure, yes. I think there are 10 tile breaks
12 there. Each tile block would require two ends to be
13 capped in one fashion or another, and that can be
14 accomplished a couple different ways.

15 Q. Wouldn't a different option be just to remove all
16 of the tile that was placed there?

17 A. That is an option. Actually that was our
18 restoration recommendation initially in this case, and
19 it's how we treated every easement violation prior to
20 about 2015. When we had tile that was placed beneath
21 wetlands, beneath protected wetland areas, we would ask
22 the land owner to remove all the tile beneath the wetland
23 out to a distance of what we calculated the lateral
24 effect of that tile to be.

25 Q. Why are you not recommending that in this case?

1 A. We learned through a prior case, from
2 Mr. Finnochiaro actually, that there's a potential to do
3 more damage to some of these wetland areas by excavating
4 the drain tile, especially when tile systems are
5 extensive.

6 Before that prior case, many of our violations
7 only involved one or two tile lines beneath protected
8 wetland areas. In the prior case, it was in Hamlin
9 County, there were some of those wetlands with extensive
10 tile systems beneath relatively large wetlands, and to
11 excavate all of that tile in his estimation would have
12 done significant damage to the wetlands themselves.

13 Q. Is it your understanding to remove the tile, you
14 have to dig in from above the surface every place one of
15 these lines are located?

16 A. Yes. That's my understanding, that you have to
17 excavate that tile to remove it.

18 Q. So your plan proposed by Fish and Wildlife
19 Service here is not to do that, but just to remove
20 portions downstream from each of the six areas?

21 A. That is correct.

22 Q. Why do you think that will work or be effective
23 at restoring the wetland areas?

24 A. Again, relying, in part, on the publication out
25 of Minnesota, which prescribes tile blockage or tile

1 removal, as I've described here, as a restoration
2 technique. We have also utilized this technique now a
3 few times since 2015.

4 Q. In South Dakota?

5 A. In South Dakota.

6 Q. In fact, that's what the two pages prior to the
7 last page indicate. I'll show you, I think it's Page 4
8 is a diagram of a property in Hamlin County with tile
9 lines inserted. Is that right?

10 A. That is correct.

11 Q. Then the blue section indicates where the tile
12 lines were removed?

13 A. That's correct.

14 Q. Then the other tile remained in the ground, but
15 was capped off?

16 A. That is correct.

17 Q. Then the next page after that says "restored
18 wetlands." Can you tell the Court what happened after
19 the restoration occurred?

20 A. The restoration was in the spring of 2016. I
21 stopped by that particular tract through the rest of 2016
22 a couple different times. In the fall of 2016 I did
23 start to notice some surface water ponding in the wetland
24 area to the upper right, very shallow.

25 In 2017, if you remember, it was a relatively dry

1 year most of the year. We did receive some precipitation
2 throughout the year, however, and by November 2017 these
3 two wetlands, in particular, were ponding water.

4 Q. So from the Fish and Wildlife perspective, was
5 this considered a successful restoration?

6 A. Yes, it was.

7 Q. Is one of the benefits to the landowner, if you
8 take this approach to restoration, a reduced cost?

9 A. Absolutely.

10 Q. Why is that?

11 A. Well, it's less time on the excavator, if you
12 have to hire a contractor and use equipment. In this
13 particular case, about 900 feet of tile was removed, as
14 opposed to if you remove all of that tile would have been
15 substantially more expense just in that regard.

16 We also have been investigating a technique --
17 we're trying to develop a technique using expandable foam
18 where we can just access the tile in one spot and inject
19 a foam compound that will completely occlude the tile
20 lines.

21 Q. Have you looked into that option for the Mast
22 property?

23 A. Not seriously, because it's been our experience
24 that we have a difficult time getting the cost down. For
25 example, in this particular case that's shown on the

1 screen, the estimated cost of foaming those lines for the
2 150 feet was about \$10,000. It was much more economical
3 just to hire a contractor with a trackhoe to excavate and
4 remove the 150-foot sections.

5 Q. Any idea what the estimated cost on the Mast
6 property would be to use expandable foam to plug the
7 lines?

8 A. Just the 150 feet or to completely fill in?

9 Q. Completely fill in.

10 A. I just eyeballed it. I would estimate -- it's in
11 the neighborhood of 6,000 linear feet of tile beneath
12 these protected wetland areas. If you use the previous
13 estimates from the Hamlin County case and extrapolate
14 that out, it could be in the neighborhood of \$65,000 to
15 \$70,000. That's just a rough approximation.

16 Q. Would expandable foam be less intrusive than even
17 the restoration plan proposed in Exhibit 1?

18 A. Far less intrusive. We would only need one
19 access point, theoretically, per tile line. We're still
20 working on the technique. But we believe we can deliver
21 the foam through the use of a trolley system that we
22 would develop to get that wand down the tile line to
23 start to inject the foam.

24 Q. But the plan in Government Exhibit 1, while
25 somewhat intrusive to the, I'll call it, downstream area,

1 would be more cost-effective?

2 A. It would be more cost-effective.

3 Q. For the landowner?

4 A. For the landowner.

5 Q. Of course, your proposal in Government Exhibit 1
6 for the restoration plan is for the landowner to incur
7 the expense of the restoration?

8 A. That is correct.

9 Q. Any idea what the restoration would cost for the
10 plan proposed in Government Exhibit 1?

11 A. I believe the estimate within the plan is \$4,000.

12 Q. How about the timing of that plan? When could
13 this be completed as proposed?

14 A. As soon as conditions are dry, dry enough to
15 allow equipment on top, without excessive damage in the
16 form of trenches, and then dry enough to excavate the
17 material and get it packed back in.

18 Q. One of the details in the restoration plan, as I
19 noticed, was there's a difference in the soil to be
20 excavated.

21 A. That is correct, yes.

22 Q. So their proposal is for some care to be taken in
23 separating the topsoil from the sub-topsoil. Is that
24 right?

25 A. That's right, yes.

1 Q. That would be needed to be done at each
2 excavation site?

3 A. That is correct.

4 Q. Are there any other concerns about the proposal
5 for this property?

6 A. There was concern expressed by Mr. Wenzel, the
7 author of the Minnesota Restoration Guide, about Wetland
8 Area No. 1.

9 Q. Wetland Area No. 1 is in the northwest corner,
10 and on the photo from Exhibit 1, there's a blue line up
11 there?

12 A. Yes.

13 Q. Is that what you're referring to?

14 A. Yes.

15 Q. What does the blue line represent on this plan?

16 A. That is an option we included in the restoration
17 plan for there to be nonperforated tile routed around
18 Wetland Area No. 1, tying back into the tile system below
19 the tile block.

20 Q. That's not something Fish and Wildlife is
21 proposing. They're just saying it's an option for
22 Mr. Mast.

23 A. That's correct.

24 Q. It wouldn't be necessary for the restoration of
25 this property for that to happen?

1 A. No.

2 Q. If you don't do that, though, does it -- then it
3 could just be as-is without that blue line?

4 A. Yes. That's correct.

5 Q. And the cost for that nonperforated line, that
6 would be in addition to the \$4,000 estimate or so?

7 A. Yes, it would.

8 Q. Have you had a chance to observe the property as
9 it sits now?

10 A. I have, yes.

11 Q. I'm going to show you Government Exhibit 2. What
12 is that?

13 A. This is an aerial photo taken by Anna Anderson on
14 November 19, 2017. Miss Anderson is a pilot for the
15 United States Fish and Wildlife Service.

16 Q. This is an aerial photograph taken over the same
17 area of land?

18 A. That is correct.

19 MR. CLAPPER: Your Honor, I move for the
20 admission of Government Exhibit 2.

21 THE COURT: Any objection?

22 MR. LEISTICO: No objection, Your Honor.

23 THE COURT: 2 is received.

24 BY MR. CLAPPER:

25 Q. Showing you Government Exhibit 2 on the screen.

1 This again was November of 2017?

2 A. That is correct.

3 Q. So six, seven months ago, approximately?

4 A. Yes, sir.

5 Q. Even as the conditions exist as depicted in
6 Government Exhibit 2, the plan that's proposed by Fish
7 and Wildlife in Government Exhibit 1, it's your position
8 that those wetland areas in Areas 1 through 7 could be
9 restored?

10 A. Yes, it is. We're hopeful they can be.

11 MR. CLAPPER: Thank you. I don't have any
12 more questions.

13 THE COURT: Mr. Leistico?

14 MR. LEISTICO: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. LEISTICO:

17 Q. Good morning, Mr. Azure. On Government Exhibit 1
18 with the restoration, so as the restoration plan with the
19 red areas, there are ten areas where the proposal is to
20 take the tile out, which would be the tile that's
21 downstream of what you've determined is a wetland area.
22 Is that correct?

23 A. Yes. It's on the downstream side of each wetland
24 area.

25 Q. So the concern that we would have is that -- I'll

1 start my questioning as to the exhibit with this other
2 property, the Hamlin property. You're aware of that.

3 A. I am.

4 Q. And on that, it appears that the tile that was
5 placed into those basins essentially just were tiled
6 within the basin. Do you agree with that?

7 A. Yes, sir.

8 Q. But on the Mast property, it appears that the
9 tile is also placed upstream from the basin, and then the
10 tile goes through the basin, and it is blocked where the
11 tile then leaves the basin. Is that correct?

12 A. Each wetland area is slightly different in terms
13 of where the tile is placed.

14 Q. But you would agree that the tile on the Mast
15 property does include areas outside of the wetland,
16 as well.

17 A. Some of them do. That's correct.

18 Q. The concern, and would you agree with this, is
19 that because the wetland is at the downgrade of the tile
20 that is basically upgrade of the wetland, that water then
21 that wouldn't otherwise enter the wetland, it may enter
22 the wetland through the tile, and then be held in that
23 basin because the downstream tile is now removed. Do you
24 see what I mean?

25 A. Kind of, but each wetland area is slightly

1 different, and in most situations it is my belief that
2 what you just said is inaccurate, because that water
3 would end up in those wetland areas.

4 The tile is placed within the contributing
5 watershed of the wetland areas in most instances. So
6 it's just taking water and expediting its delivery to
7 those wetland areas.

8 Q. But the water would otherwise get there, so the
9 removal of the upstream tile wouldn't alter that wetland
10 area?

11 A. Yes, sir. Only it would deliver that water a
12 little bit quicker and in a little bit different fashion.

13 Q. The tile would?

14 A. It would.

15 MR. LEISTICO: Thank you. I have no other
16 questions, Your Honor.

17 THE COURT: So the map, as it's drawn on
18 Page 7 of Exhibit 1, would that restore the wetlands
19 to the now existing or recurring due to natural causes
20 as of 1973?

21 THE WITNESS: I'm assuming you are looking
22 at the restoration plan with the tile blocks on it?

23 THE COURT: Right.

24 THE WITNESS: Our goal with the restoration
25 plan is to restore the area back to how it was prior

1 to the tile being installed.

2 So with respect to the capacity of each
3 wetland to pond water, it really doesn't take into
4 consideration the water budget of each wetland area,
5 if that makes sense.

6 So, yes, prior to 2013, prior to 1973, in
7 this instance is the same.

8 THE COURT: Okay. So the time -- 2013's
9 status quo at that point would be comparable to how it
10 was in 1973?

11 THE WITNESS: Untiled, yes.

12 THE COURT: Untiled.

13 THE WITNESS: Yes. When we use pre-2013,
14 pre-1973, untiled is what we're after.

15 THE COURT: Okay. And the option of adding
16 in the blue nonperforated is because of the fact that
17 the landowner to the west put in tile, and it would
18 allow that water to go through that blue area and then
19 exit the property?

20 THE WITNESS: It would. Mr. Finnochiaro, in
21 particular, expressed concern about what he terms
22 "tile blowouts" with hydraulic pressure.

23 Depending on the extensiveness of the tile
24 system to the land to the west and how much water
25 comes down that line, if it hits a block and has

1 nowhere to go, there's a potential for it to blow out,
2 for lack of a better term.

3 THE COURT: Okay. Any other questions,
4 Mr. Clapper?

5 MR. CLAPPER: No, Your Honor.

6 THE COURT: Mr. Leistico?

7 MR. LEISTICO: None, Your Honor.

8 THE COURT: You can be excused. Thanks.

9 (Witness excused)

10 THE COURT: Any other witnesses?

11 MR. CLAPPER: No, Your Honor.

12 THE COURT: Mr. Leistico, any witnesses?

13 MR. LEISTICO: No, Your Honor.

14 THE COURT: Why don't I hear from
15 Mr. Leistico first, since I think Mr. Clapper is just
16 going to say that this plan should be adopted. Is
17 that a fair summary?

18 MR. CLAPPER: That's fair, Your Honor.

19 THE COURT: Mr. Leistico?

20 MR. LEISTICO: Your Honor, first of all,
21 we're here presented for sentencing.

22 Regardless of what the Court orders on the
23 restoration plan that's been submitted, Mr. Mast is
24 prepared to follow the Court order. He does have
25 concern with the restoration order and has been

1 working with Fish and Wildlife for some time, as the
2 Court is aware.

3 As to this particular restoration plan, I
4 think the Court's questions to Mr. Azure right at the
5 end were very on point with the concern. He indicated
6 they did not do a water budget. They're assuming the
7 conditions in 2013 are exactly what they were in 1973
8 with no basis.

9 I think at the trial there was ample
10 evidence, which is where the idea of the blue
11 nonperforated line came in the northwest, that there's
12 additional water. That's water that, under South
13 Dakota law, it's a civil law rule. It's a natural
14 swale that's entering his property.

15 It's questionable he could stop that
16 landowner from allowing that water to outlet onto his
17 property, whether he wanted to or not.

18 It certainly wasn't water that was on the
19 site in 1973. That was put in, that tile to the west,
20 about in 2013 at the time that Mr. Mast placed his
21 tile.

22 If the Agency is simply not taking that into
23 consideration, other changes on the site, there was
24 ample evidence at the trial, I believe, as well, in
25 the southwest corner of the property, going into

1 what's been depicted as Wetland Area No. 3, which was
2 never touched by Mr. Mast, and that water then enters
3 wetland Area No. 3, and then doesn't allow Wetland
4 Area 4 to drain as well as it used to, Wetland 5,
5 Wetland 6, Wetland 7, which is the natural drain, and
6 I believe there is fairly conclusive evidence that the
7 Wetland 3 does drain to the northeast.

8 So it all backs that up, which I
9 fundamentally believe is the reason Mr. Mast did the
10 tiling. This had never been done before. It was that
11 there was both tile from the south, southwest, west,
12 and northwest.

13 I think the Agency should take that into
14 consideration in forming a water budget, so that the
15 site is what it was in 1973, substantially different
16 in 2013.

17 I can't argue that the 150-foot tile break
18 below the wetlands is the standard under the Board of
19 Water and Soil Resources in Minnesota, the BWSR, as to
20 how they restore wetlands.

21 But unlike the example in the Hamlin matter
22 that is part of Exhibit 1, there is tile that is
23 outside and upstream of the wetlands. Mr. Azure
24 testified that it will change the timing and the way
25 the water gets into these wetlands, so it will be a

1 bottleneck.

2 So at a minimum, we do ask that the Agency
3 go back and do a water budget, and have more
4 discussions with the Agency on the restoration plan,
5 as proposed.

6 But that regardless of the restoration plan,
7 that it doesn't stop Mr. Mast from removing the tile
8 that is outside of the wetland areas, but upstream of
9 those. Because right now it's -- I mean these were
10 placed with the idea that it would move the water
11 through the basins, downstream, and off the property.

12 But by just blocking the bottom, and it's
13 all a matter of cost, but that he be allowed -- the
14 testimony from Mr. Azure in questioning by Mr. Clapper
15 was that the soil profile would be removed, with the
16 topsoil being removed, and then the undersoil being
17 placed back in that order. So they have the more
18 organic soil on top. We understand that.

19 But that as to those wetlands, if they start
20 to pool, that he not be limited by Court Order now to
21 continue to allow those areas to pool without any
22 relief in removing that tile that's upstream from
23 those wetlands. Mr. Mast believes that will be a
24 concern.

25 I think it would be a tradeoff matter, if

1 the Court orders restoration, as to whether it would
2 be cost-effective to do that.

3 But as Mr. Azure indicated, that water is
4 going to get to those wetlands, anyhow. It doesn't
5 need the tile. The tile would be artificial.

6 That Mr. Mast be, at least, allowed the
7 opportunity to take that into consideration as to any
8 restoration, and that he should be able to put
9 perforated tile or some other mechanism to allow water
10 that is now entering from manmade causes. It's not
11 natural existing at the time. It's not naturally
12 recurring.

13 This is something that's substantial
14 acreage. I believe there's testimony, but my
15 recollection is it was well over a hundred acres or
16 more of additional land being tiled into the property,
17 and that is something he has no relief to move, and
18 yet isn't part of the easement which he respects.
19 He'll do whatever the Court orders him to do, but we
20 would ask this restoration order not be approved, as
21 submitted, based on the comments and the testimony,
22 Your Honor.

23 THE COURT: Mr. Clapper?

24 MR. CLAPPER: Well, Your Honor, we're asking
25 the restoration plan, as proposed in Government

1 Exhibit 1, be approved by the Court.

2 The objections by the defense are very
3 vague, and he's offered no counterproposal to try and
4 deal with restoring any of the wetland areas to the
5 condition they were in prior to the time he installed
6 the drain tile.

7 The plan submitted by the Government is a
8 reasonable one. It's a cost-effective one for the
9 Defendant, and it's the least disturbing, not quite
10 the least disturbing, but less disturbing than
11 removing all of the tile.

12 If we want to go back to status quo,
13 previous to his time of installing the drain tile,
14 we'd just rip it all out. Then he will suffer the
15 consequences of dealing with extra runoff from some of
16 his neighbors.

17 If the Court is contemplating something
18 other than the plan as proposed in Exhibit 1, I think
19 we need some more details about it, Your Honor.

20 But this plan, as proposed, is a reasonable
21 one and an effective one, based on other places that
22 this method has been used to restore the wetlands.

23 THE COURT: So if Mr. Mast wanted to remove
24 more of the tile line than what's marked in red, would
25 you have an objection to him being able to do that if

1 he followed the correct protocol on replacing the
2 soil?

3 MR. CLAPPER: I think we would want to know
4 where as to each line. I think the plan, as proposed,
5 is designed to try and not disturb any of the
6 designated wetland areas.

7 If the tile line proposed, in addition to
8 the red lines, is not in those areas, I don't think
9 Fish and Wildlife would have any objection to that.

10 Without seeing a specific proposal as to
11 what it is, we have some concerns about removing,
12 versus trying to re-route, some of that water, too.

13 THE COURT: So, Mr. Leistico, does your
14 client have specific areas that he has identified
15 where he might want to remove more of the tile line?

16 MR. LEISTICO: Thank you, Your Honor. And I
17 appreciate Mr. Clapper's comments about having a
18 detailed plan.

19 Based on the time of this trial and the
20 conditions on site, it takes a fair amount of fair
21 weather, unfrozen ground, to complete a water budget,
22 so we don't have that.

23 As to -- we don't know that there's going to
24 be artificial, additional ponding because of the other
25 tile on those sites. It may be that the cost would be

1 so excessive that if there is additional ponding, it's
2 not offset by the cost of taking the tile.

3 But as to the areas identified, and
4 specifically in 1, you can see there's a large amount
5 of tile that would then be blocked off. If the Court
6 recalls from the testimony, the elevations in that
7 part of the property were quite severe.

8 So all of the other tile in 1 would end up
9 stopping right where the yellow dot. In fact, all of
10 the yellow dots are where the water from that tile
11 would be.

12 On the Hamlin property, that tile is, not
13 completely, but almost completely within areas of just
14 that basin. Some of the tile, like in Wetland 4 and 5
15 and 7 and 6, there's extensive tile outside of those
16 areas.

17 I don't think it would be a matter of
18 violation of the easement if he would take tile
19 upstream out, just like he's doing downstream. At
20 least he would have that option if it would be a
21 problem. It sounds like the Government doesn't have
22 an objection if he follows the soil protocol, which we
23 understand, for sure within those basin areas, which
24 is where their easement applies.

25 The biggest concern of all the water on the

1 site is coming from the southwest into Area 3. That
2 is simply being blocked, and he is held harmless
3 basically against his neighbors -- or they're held
4 harmless against him. The Government is asking for a
5 Court Order that he can't ever do anything about that
6 water.

7 I've worked with many cases with U.S. Fish
8 and Wildlife Service where they have recognized that
9 additional water. I wouldn't see the harm in having
10 that recognized here. There would be a number of
11 variety of ways that could be done without removing
12 the hydrology within these seven basins.

13 THE COURT: So, Mr. Clapper, is U.S. Fish
14 and Wildlife the only entity that would have to
15 approve any changes to the restoration map?

16 MR. CLAPPER: Yes, Your Honor. It's their
17 easement.

18 THE COURT: If the Court adopted this
19 restoration plan, subject to changes mutually agreed
20 upon, between U.S. Fish and Wildlife and Mr. Mast, is
21 that acceptable?

22 MR. CLAPPER: I'm not in the practice of
23 doing this, Your Honor, so I'm just trying to
24 contemplate the worst case scenarios.

25 The worst case scenario is we don't agree,

1 the parties disagree, and they have to come back here.

2 So to the extent it contemplates coming back
3 here to deal with unresolved disputes, I don't have a
4 problem with that.

5 THE COURT: Mr. Leistico?

6 MR. LEISTICO: Thank you. I wasn't clear if
7 Mr. Clapper wants an outcome that wouldn't allow for
8 the parties to come back here if they can't agree, or
9 if Mr. Mast is okay -- as long as that's the worst
10 case scenario, that the Court would be the final
11 determiner then. I was just unclear of your position.

12 MR. CLAPPER: So if I understand what the
13 Court is saying, the plan, as proposed, anything
14 outside of this would have to be agreed to by the
15 parties.

16 THE COURT: Right.

17 MR. CLAPPER: If it's not agreed to, it
18 either won't happen, or we'll have to come back to the
19 Court for that to be decided.

20 THE COURT: Right. So I would view it, if
21 you don't agree, you have to comply with the plan. I
22 would assume at that point if Mr. Mast wanted someone
23 else to weigh in on it, he would make the motion to
24 have the Court consider his alternative.

25 I would think Fish and Wildlife wouldn't be

1 making the motion. It would be Mr. Mast.

2 MR. CLAPPER: Okay. I don't have an
3 objection to that.

4 MR. LEISTICO: I would prefer that over
5 mutually agree as the only basis, because then if they
6 didn't agree, we would be without remedy. So I would
7 appreciate that.

8 I do think NRCS would have to approve for
9 the nonperforated at least on the southwest. There
10 may possibly be a county ordinance that could apply,
11 but I don't know that, as I stand here now.

12 NRCS, I think they could be satisfied, but
13 it would have to be contemplated, and we would do
14 that, as well. He has an independent obligation, and
15 we have a certified wetland determination.

16 So if it didn't touch those areas, then
17 there would be no sign-off needed from NRCS. But if
18 it did touch those areas, they would have to sign that
19 off. They typically do that in the normal course.
20 We'd go through that process. Thank you.

21 THE COURT: So I just wanted to make sure
22 that if there were other approvals that needed to be
23 made, that Mr. Mast gets those. I don't want to say
24 anything today that would indicate that it's just Fish
25 and Wildlife if NRCS also has to sign off on

1 something.

2 MR. LEISTICO: No, I appreciate that. I
3 expect that the Court's Order here is not ordering
4 them to have to comply with it if Fish and Wildlife
5 does. He understands any other government, state, or
6 federal requirement, he would do that independently.

7 THE COURT: Okay. So my suggestion would be
8 that I would indicate that Mr. Mast has to comply with
9 the restoration plan, subject to changes agreed upon
10 between U.S. Fish and Wildlife and Mr. Mast, and if
11 the parties are not able to agree, the Court will be
12 the final arbiter.

13 Is that acceptable to both sides?

14 MR. CLAPPER: Yes, Your Honor.

15 MR. LEISTICO: Yes.

16 THE COURT: Okay. That's the restitution
17 that I will order then. Mr. Clapper?

18 MR. CLAPPER: Your Honor, the other issue
19 regarding that has to do with timing. I would request
20 a deadline be placed on completing the plan, as
21 proposed.

22 THE COURT: What deadline do you have in
23 mind?

24 MR. CLAPPER: June 1 of this year.

25 THE COURT: Mr. Leistico?

1 MR. LEISTICO: Thank you, Your Honor. If
2 the Court orders it, he will do his best to complete
3 the restoration order.

4 I think, in good faith, there could be an
5 attempt to have it done by June 1st.

6 I would ask for a Court Order of September
7 1st, and I do that for the reason of the weather.
8 That if it is a wet spring, whether it looks like it
9 will be now or not, the weather will do what the
10 weather does.

11 I've been in many situations where we have
12 to go back to the Court, because June 1st there's snow
13 melt, rain, it's excessively wet, and it would cause
14 more harm to these areas than it would if it was, I
15 think the testimony was, as soon as it's dried out.

16 So what I would ask is that it be
17 September 1st, without the need for coming back for
18 relief from the Court, but that the parties, in good
19 faith, would seek to have it done much sooner than
20 that.

21 Seeing some of these, you just can't get it
22 done in a particular growing season, but the effort
23 would be to get it done. But I think September 1st
24 would make it possible that we could assure, in all
25 likelihood, it would be done by that time.

1 THE COURT: Mr. Clapper, did you want to add
2 anything else?

3 MR. CLAPPER: No, Your Honor.

4 THE COURT: In light of the fact that it
5 looks like we're having a very late spring, since it
6 just snowed again this weekend, and I think they're
7 predicting more snow this coming weekend, I think
8 June 1st might be a little over-ambitious, especially
9 if you want to make sure the land is dried out so that
10 it doesn't do more harm to the area.

11 So I'm going to set a deadline of
12 August 1st, and just ask to try to have it done as
13 soon as possible.

14 So then on the other sentencing issues,
15 Mr. Leistico, would you like to speak on behalf of
16 your client?

17 MR. LEISTICO: Thank you, Your Honor.

18 I think the presentence investigation set
19 out Mr. Mast adequately. He presents himself here.
20 He's never been in trouble with the law of any kind.
21 I think he is the last person that wants to be here
22 for any reason. He didn't try to be here.

23 He understands what the jury verdict means.
24 He will follow the direction of the Court.

25 He will restore this, unless otherwise

1 agreed to by the Court or Fish and Wildlife, and I
2 believe we can come to an amenable agreement without
3 the need for the Court's intervention at a later time,
4 and he will do that restoration.

5 I don't think he meant -- I spent a lot of
6 time with Mr. Mast. I don't think he meant to violate
7 an easement or otherwise. He sincerely apologizes for
8 the time this matter has taken.

9 He did work with Fish and Wildlife at some
10 length to work out what he thought was a proper
11 restoration order. But he's here to follow the
12 Court's order.

13 I would ask initially, as set out in our
14 presentence filings, one, I think that I very
15 strenuously would ask the Court for no incarceration.
16 I don't think he'll ever be back in front of this
17 Court or any other Court, based on the experience he's
18 shown everyone in his life. He will follow through
19 and get this matter taken care of. I would ask the
20 Court -- I think that is something that would be
21 appropriate.

22 I would ask the Court to consider the cost
23 in doing the restitution on the site, for the cost of
24 that in offsetting the fine amount. I would ask the
25 Court, if there's going to be a fine, a lower fine to

1 allow for that.

2 He put in tens of thousands of dollars on
3 this tile. I think he thought it was approved. He
4 ended up being wrong. But he's going to have to live
5 with that cost, without any benefit to the property.
6 So I would ask the Court to consider that.

7 And as to any probationary time, if the
8 Court is going to require probationary time, that that
9 be no longer than necessary to assure that the
10 restitution is complete.

11 Other than that, he has followed the NRCS
12 requirement. He will follow the order of the Court
13 here. I ask you to take his entire life experience
14 and situation and his background on this matter into
15 consideration on the sentencing.

16 We'd ask for no incarceration, and a
17 reasonable fine, if the Court is so inclined, and I
18 would ask the Court to have any probationary period
19 just be long enough to assure that the restoration is
20 completed. Thank you.

21 THE COURT: Thank you. Mr. Mast, did you
22 want to say anything?

23 THE DEFENDANT: Your Honor, I just want to
24 apologize for this situation. I never meant for this
25 to happen. I thought it was worth defending. I

1 respect your decision.

2 THE COURT: Thank you. Ma'am, did you want
3 to say anything? Okay.

4 Mr. Clapper?

5 MR. CLAPPER: Thank you, Your Honor.

6 Your Honor, this was a very important matter
7 to the Fish and Wildlife Service. These easements
8 have been in place for years. They try to work very
9 reasonably and diligently with landowners.

10 They try to put them on notice of what their
11 easements are. They try to work with them when
12 requests are made. I think the Court could see that
13 from the testimony that was offered at trial.

14 Here we have six distinct wetland areas on
15 this property that were all affected by the
16 installation of drain tile, that if Mr. Mast had paid
17 more attention to the correspondence that was sent to
18 him, he could have avoided all of this.

19 But we're here now with this. The
20 Government is not seeking any jail time. This is not
21 the offense that that would be warranted.

22 But we are seeking the Court's order of the
23 implementation of the restoration plan, as submitted
24 by the Government, as well as a fine in this case.

25 THE COURT: Thank you.

1 Mr. Mast, especially this time of year, when
2 the ducks and geese and waterfowl are migrating from
3 the south to the north, I think everybody in
4 South Dakota understands how important these wetland
5 areas are. They are necessary during that migration
6 period, in particular, so that the waterfowl have a
7 place to land on that long migration route that
8 they're taking.

9 It did appear to me during the trial that
10 U.S. Fish and Wildlife was trying to put you on
11 notice, and for some reason, it just did not work out.
12 But that's why it is important for you to restore
13 these lands so that they are restored back to wetland.

14 I don't see any reason to impose a custody
15 sentence. So there will be no custody sentence.

16 I think one year of probation is sufficient.
17 Assuming you don't have any violations, if you're able
18 to restore the land, you can ask to have the probation
19 period ended early once that restoration plan has been
20 put into place.

21 I'm going to impose a small fine of \$100,
22 and then there will be the \$10 special assessment fee.

23 Your only condition of probation will be
24 completion of the restoration plan.

25 If you would please stand, I'm going to

1 state the sentence, but I won't impose it until
2 counsel has had an opportunity to state any
3 objections.

4 Under the statutory and constitutional
5 authority vested in this Court, it's the judgment of
6 the Court that the Defendant, Kevin Mast, is hereby
7 placed on probation for a term of one year.

8 While you're on probation, you must not
9 commit another Federal, State, or local crime. You
10 must not unlawfully possess a controlled substance.
11 Mandatory drug testing is suspended, because I think
12 you're a low risk of future substance abuse.

13 You must comply with the standard conditions
14 that have been adopted by this Court and the following
15 special condition:

16 You must comply with the restoration plan,
17 subject to any changes agreed upon between U.S. Fish
18 and Wildlife and you. If the parties are not able to
19 agree, the Court will be the final arbiter of any
20 proposed changes.

21 It is further ordered that you shall pay to
22 the United States a fine of \$100, which must be paid
23 before the end of your term of probation.

24 I find you do not have the ability to pay
25 interest, so the interest is waived, but you will need

1 to pay to the United States a special assessment of
2 \$10, which is due immediately.

3 And if you haven't fully complied with the
4 restoration plan or paid the fine or special
5 assessment, you need to notify the Court of any
6 material change in your economic circumstances that
7 might affect your ability to complete the restoration
8 plan, pay your fine, or special assessment.

9 Counsel, are either of you aware of any
10 reason why the sentence can't be imposed as I stated?

11 MR. CLAPPER: No, Your Honor. But did you
12 mention the deadline?

13 THE COURT: Thank you. The deadline for
14 complying with the restoration plan is by August 1st
15 of 2018.

16 MR. CLAPPER: Thank you. No objection.

17 THE COURT: Mr. Leistico, any objections?

18 MR. LEISTICO: I have no objection,
19 Your Honor.

20 THE COURT: Then the sentence will be
21 imposed as I stated. You can be seated.

22 Mr. Mast, if you think that a mistake was
23 made and you want to have another Court review what
24 it's done, you would need to file a notice of appeal
25 within 14 days from today with the Clerk of Courts

1 Office. Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: Anything further from either
4 side?

5 MR. CLAPPER: No, Your Honor.

6 MR. LEISTICO: Nothing else. Thank you,
7 Your Honor.

8 THE COURT: We'll be adjourned.

9 (End of proceedings at 11:00 a.m.)

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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
3 SOUTHERN DIVISION

4 I, Jill M. Connelly, Official United States
5 District Court Reporter, Registered Merit Reporter,
6 Certified Realtime Reporter, and Notary Public, hereby
7 certify that the above and foregoing transcript is the
8 true, full, and complete transcript of the
9 above-entitled case, consisting of Pages 1 - 40.

10 I further certify that I am not a relative or
11 employee or attorney or counsel of any of the parties
12 hereto, nor a relative or employee of such attorney or
13 counsel, nor do I have any interest in the outcome or
14 events of the action.

15 IN TESTIMONY WHEREOF, I have hereto set my
16 hand this 28th day of June, 2018.

17 /s/ Jill M. Connelly

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